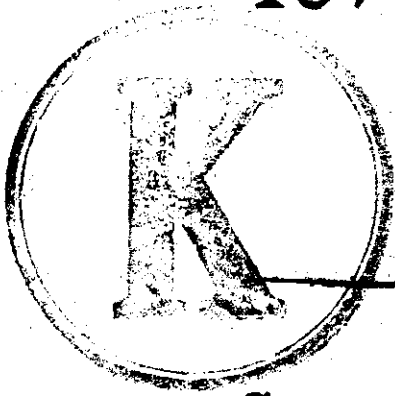


1944.

File No. O. Waters/44

Legal Department

A BRANCH



Subject:— Opinions in connection with
the collection, retention and
distribution of water —

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1-9

File No. O. Waters/44

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AKS
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Office of the R.L.A.

Section 130 and 131 of the Government of India Act were referred to in the R.L.A's opinion No.8518 dated 17-11-1943 with a view to showing what were the rights of the respective Governments as regards supply of water from natural sources and not with a view to taking action under those sections. If the question of settling the dispute arises before Federation is established the procedure indicated in R.L.A's opinion No.8373, dated 16-10-42 will have to be followed.

Sd/- P.H.MOS.
13/1/44.

Remembrancer of Legal Affairs.

SM/10.7.

U.R to P.H.D. No. 283 dated 13-1-44

Office of the R.L.A.

Both this case and the Dhor State case raise not only the question of the rights of riparian owners but also the question of the respective rights of the Bombay Government and Indian States in the Collection retention and distribution of waters flowing through their territories. In that respect the two cases are alike and the legal position is much the same. That position has been explained in the Dhor State case. (U.R. No. 4560, dated the 12th June 1942). The R.L.A. did not intend to suggest that the circumstances of the two cases were the same or that the decision on the two requests by the two States should be the same.

Sd/- F.N. MOGS
19-5-44.

Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 3637, dated the 20th May 1944.

SNT/10.7.

I cannot but regret that the very important correspondence relative to the right claimed by His Highness the Bhucwar to establish salt works and to open new ports in his territory without the consent of the British Government now for the first time brought to my notice was not laid before me when I was consulted in June last respecting in the case of Bhaua Morar and other charged with an offence against Act VI of 1863 section XIII; as such correspondence shows clearly, what the Treaties do not, viz., the existence from the commencement of this century of certain arbitrary rights exercised first by the Peishwa and afterwards by the British Government as his successors, over the territories of the Gwalwar, which are inconsistent with those relations, which ordinarily exist between two independent nations.

2. Previous to writing my opinion No.46 of the 9th June last I had read the Treaty of Bassien and the various treaties with the Gracowar collected in Mr. Thomas's Volume published by Government in 1851 and I had also searched the Records of this office but I could find nothing to show that the case before me was to be treated in any other way than upon the ordinary principles of international law.

3. It appears however from the accompanying copy of the letter No. 182 of 19th January 1857 from the Officiating Chief Secretary ~~to~~ the Government of Bombay to the Secretary to the Government of India that (para 6) "The 'researches its own records and these of the Peishwas Government which this Government has caused to be made into ~~in fact~~ ^{in fact} ~~ment is not~~ ^{ment is not} throw any light on the origina of the claim to interfere with the opening of sea Ports in the Gulph of Cambay. At the same time the existance of such a right is ' fully established."

"That (para. 9) 'The statement made by Major Walker in the extract from his letter of the 2nd November 1864, appears to His Lordship in Council conclusively to prove that there has been from ancient times a certain number of recognised ports in the Gulph of Cambay to which Trade was restricted. That it is clear that at the commencement of this century when it was the policy of the British Government to extend by all means its territorial possessions and influence in the part of the country now referred to the right of the 'Peishwa to interfere to prevent the opening of a new port in the River Mahi was considered to be so fully established as to offer us no pretext for opposing it."

That para (13) 'His Highness the Guicewar has not nor has *of the country a single port in the Gulph of Cambay or in any of the* had since long previous to our acquisition of the river leading into the Gulph although the Pergannas of Nawsaree and Gundavee belong to his Highness, the sea Ports and customs on trade in these Pergannas and the navigation of the Rivers by which they are traversed are in the possession of the British Government and were in the possession of the 'Peishwa to which we succeeded. "This appears to His Lordship in Council a very significant fact. His Highness is and always had been excluded from any share of the Trade of the Gulph of Cambay, originally no doubt with the view of enhancing the Revenue which the Pe-ishwas derived from that trade."

"That para (14) 'This revenue is not now a matter of much moment. In fact since the abolition of customs on the Port to Port Trade it is of little value. The control of the sea Port is however of greater value than ever."

And that (last para.). 'In conclusion the Right Hon'ble the Governor in Council expresses the hope that the information now submitted will satisfy the Right Hon'ble the Governor General in Council that neither the right to open new Bunkers or to manufacture salt now claimed by the Guicewars Government were

ever exercised during the Peishwas supremacy. That the concession of the former can only be safely granted under such instructions as may secure our customs and especially our opium duties, and that the latter cannot be granted without immediate sacrifice of revenue as well as of the sovereign rights of the British Government."

4. In the letter from the Government of India No. 3193. of 31st May 1859 replying to the above quoted letter it is stated in substance that the Governor General in Council admits that the right of the British Government as to the control both of salt works and sea ports in the Guicowars Territory adjoining the Gulph of Cambay does not rest upon grounds so clear and explicit as in matters of so much importance to the two states as respectively are desirable. That this appears to have arisen from the underlined nature of the rights as exercised by the Peishwa and by a want of provision in the terms of our succession to those rights. But His Lordships in Council has not the least doubt that the continuance to maintain those rights (for they have never yet been surrendered) is not wrong and ought to be no disappointment to the Guicowar. That Peishwa undoubtedly exercised the rights of prohibiting the opening of ports in the Gulph of Cambay. That the Government of East India Company recognized his rights to do so in 1804 and the Guicowar recognized the inherited right of the British Government to do so in 1850 and the letter concluded by stating "In this matter also His Excellency in Council cannot consent to admit the claim advanced by the Guicowar, or to make any concession which would be injurious to British interests."

5. Viewing the matter in the light of what has been the practice from the commencement of the present century, as disclosed by the above extracts and the accompanying correspondence, and bearing in mind the great importance of preserving intact the rights of the British Government over seaports and creeks in the Guicowars Guzerat Territory, I think it most desirable that the existing British rights of supremacy over that Territory should not be in the slightest

slightest degree disturbed by any narrow construction of Act VI of 1863 section XIII.

6. Assuming therefore that the Deputy Commissioner of Customs, H.D. is correct in saying (para 7 of his letter No. 478 of 3rd July last) that all sea customs in foreign Gujerat belong by right of inheritance to the British Government and that hitherto there has never existed ~~the~~ doubt of the applicability of section XIII of Act VI of 1863 in cases where goods have been landed or attempted to be landed at Port other than Newsaree or Gundavce in foreign Guzerat, and that many cases have been adjudicated under that section I would suggest that no doubt should now be thrown upon the exercise of a jurisdiction so important and so essentially necessary for the safety of our customs laws and that all offences as similar to that alleged to have been committed by Bhaus Morar and other should be punished by confiscation under section XIII of that Act. With the materials now before me I cannot but feel that my opinion No. 46 was incorrect.

Bombay }
6th Sept. 1866.)

Signed/Littleton H. Bayley,
Advocate General.

(True copy)

Signed/ Risley V. Hean,
Solicitor to Government.

True copy

Sd/-

for Assistant Secy. to Government.

Office of the R.L.A.

In order to enable the R.L.A. to give the opinion on question raised the R.D. is requested to supply the information on the points stated below :

2. It is presumed that the Sachin State contractors take sand etc. from the bed of the Tapti only opposite the village Dumas Bhimpore and Gavis. It is also presumed that these three villages are in Sachin State territory. Would R.D. kindly say whether these presumptions are correct and also supply the following information and documents :-

- (1) Is the Tapti river tidal at these three villages?
- (2) Do any of them lie within the limits of Surat port?
- (3) The notification or other authority fixing the limits of Surat Port.
- (4) The G.R. which is cited in the letter of the Assistant Collector of Salt Revenue, Surat, at page 119 of the file for the view that the British Government's authority in the whole of Southern Gujarat extended over the sea, bays, creeks and rivers up to high water mark. It appears, that it has been wrongly numbered or dated by the Assistant Collector but efforts may be made to trace it since it may be of much importance in the case. ~~made to trace it since it may be much importance in the case.~~
- (5) Is the Tapti river tidal at Surat City?
- (6) A map showing the limits of Surat port and the position of the three villages above mentioned.

Sd/-

for Remembrancer of Legal Affairs.

U.R. to R.D. No. 2428 , dated the 2nd April 1943.

Office of the R.L.A.

The Tapti river forms the boundary between the British District of Surat and the Sachin State; and the port of Surat includes the south bank of the river and the Sachin villages *of Dumas and Bhimpore and the adjoining another Sachin village of Gaviar*. The river is tidal at these villages and is also ~~the~~ tidal at Surat City. The Sachin State appears to ~~claim title at~~ ~~the mouth of the Tapti river~~ ~~at the mouth of the Tapti river~~ to half the bed of the river in front of the villages of Dumas, Bhimpore and Gaviar and the right to remove sand, gravel etc. in the bed of the river within its jurisdiction. The Assistant Collector of Salt Revenue in his report No. 11-80 dated 9th January 1940 (at page 119 ante) observes:-

"All these conditions (i.e. conditions subject to which the Peshwa granted the Sachin State in 1791) go to prove that the grantee was not to be an independent ruler over the inam lands but only a feudatory or a petty chief of a subsidiary state and that the Peshwa was the paramount power The Sachin State has no jurisdiction whatsoever over the water portions of either the Tapti over which prevails the sovereignty of the British Government (Aitchison Treaties, Supplement Treaties of Bassain Art. 8 p. 61 Vol. VI) or the Mindhela at whose mouth were situated the Gaikwar's sub ports of Danti, Ubrat etc. at the time. It has been also held (Government Resolution Revenue Department, No. 2489, dated 26th September 66) that the authority of the British Government extended over the sea, bays, rivers and creeks in the whole of the southern Gujarat up to high water mark It is probably on these ~~valid~~ grounds that portions of the Tapti and Mindhela rivers are included from 1843 and before in the port limits of Surat along with the two State villages of Dumas, Bhimpore (Sachin State) and Danti (Gaikwar) all bordering on the banks of these rivers. The Sachin State cannot therefore levy any customs duty in any form as that ~~is~~ tantamount to usurping the rights of the paramount power - now the British Government - or recover port or any similar dues under any State Firman as that would tantamount to opening a new port in his ~~territory~~ territory."

On the strength of this report of the Assistant Collector, Salt Revenue, both the Collector and the Commissioner concluded that the Sachin State had no rights whatever in respect of the sand in the Tapti river bed and that the whole bed of the Tapti and of the sea adjoining vested in the British Government (see pages 140 and 149 ante). Government wrote to the Resident, Baroda observing:- (page 191 ante).

The normal rule of midstream or midbank does not operate in deciding the question of jurisdiction of the Sachin State over any part of the bed of the river Tapti but that it has to be decided on treaty rights. In this connection attention is invited to Article 1 of the Agreement No. XI of 6th June 1791 (page 97 of Aitchison Treaties Vol. VII) and to Article 8 of the Supplemental Treaty of Bassien (page 61 of Aitchison Treaties Vol. VI) in view of which the Government of Bombay considers that the whole of the bed of the river Tapti in the Surat district and the part of Surat including the south bank of the river and the village of Dumas vests in the Crown and the Sachin State has no jurisdiction. Consequently the Sachin State has no authority to issue permits for removing sand and gravel and the Collector can take suitable action under the provisions of the Land Revenue Code and Rules for such unauthorised removal."

It appears that the letter to the Resident has evoked a protest from the Sachin State whose Chief Minister has sent an interim reply in the following terms:- (page 229 ante).

h (see below)

"The Durbar seriously resents this obviously unwarranted and high handed action of the Bombay Government which has been taken for the first time after 151 years of the creation of the State. In the past the Collector of Surat has been giving contracts for the removal of gravel and sand from the Surat portion of the Tapti river which did not definitely include the Sachin ~~portion of the~~ State's portion of the Tapti bed. The Sachin State has continuously realised income from gravel and sand allowed to be removed from the State's portion of the Tapti river. Since 1916 the State has without any interruption given contracts for the removal of such gravel and sand. In 1877 Mr. Ollivant, Assistant Agent was in charge of the State administration. The Collector of Surat asked the Administrator of Sachin to permit the executive Engineer and the Surat Municipality to remove gravel free of charge from the state portion of the Tapti river. The Administrator gave permission not as of right but as of favour and not as of right and the application should be made for its renewal from year to year." There is therefore a continuous open and undisturbed exercise of right of the State in this respect."

After receipt of the letter from the State the question was further investigated by Government. A(R) observes at page 293 thus:

"I do not know if our case is strong enough to take up to the Crown Representative. So far as it rests on the two agreements quoted from Aitchison's Treaties it seems to me rather weak and it is certainly incorrect to say that in the two agreements the Sachin Durbar had recognised the ownership of the Crown over the Tapti river. The agreement No. XI at page 97 of Vol. VII had nothing whatever to do with this question. The other agreement quoted is Treaty of Bassien. It is true that Supplemental Article 8 of this Treaty recognises that the sovereignty of the river Tapti belongs to the British Government but this seems to have been with special reference to the disposal of wrecked ships finding their way into the river. I do not know whether it would be held to govern the rights of the contracting parties to remove sand and gravel in the bed of the river, still less whether the Sachin Durbar can be bound by it. In relying upon these treaties we are merely following the arguments of the Assistant Collector of Salt Revenue at page 119 ante and I think some better authority than this is necessary. The other ground on which the Government laying claim to the whole of the river including the south bank is that the ~~Sachin village~~ Sachin village of Dumas has been included in the part of Surat. This seems to me inconclusive because the State's jurisdiction over Dumas has not been ousted even though the village forms part of the part."

h observing: "The permission is given as a matter of favour"

The R.L.A. is requested to advise whether Government's claim to the whole bed of the river is strong enough to override the usual rule of midstream.

2. According to the International Law "boundary rivers are such rivers as separate two different States from each other. If such river is not navigable, the imaginary boundary line as a rule runs down the middle of the river, following all turnings of the border line of both banks of the river. If navigable, the boundary line as a rule runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river. But it is possible that the boundary line is one bank of the river so that the whole bed belongs to one of the riparian States only. This is an exceptional case created by immemorial possession, by treaty or by the fact that the State has occupied the lands on one side of the river at a time prior to the occupation of the lands on the other side by some other State." (See Oppenheim Vol. I pp. 415, 416). But the Indian Native States have none of the attributes of external sovereignty and for international purposes the territory of native States is in the same position as the territory of British India. Consequently the principles of International Law do not directly govern the relations between the Government of India and the Native States (pp. 169, 422 and 423 of Ilbert's Government of India, third edition). In this connection it is useful to quote Sir Henry Maine's remarks in his minute on Kathiawar:

"The mode or degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact which has to be separately decided in each case and to which no general rules apply. In the more considerable instance there is always some treaty, engagement, or summat to guide us to a conclusion, and then the only question which remains is, what has become of the sovereign rights which are not mentioned in the convention? Did the British Government reserve to itself or did it intend to leave the Native Power in the enjoyment of them? In the case of Kattywar the few ambiguous documents which bear on the matter seem to me to point to no certain result, and I consider that the distribution of the sovereignty can only be collected from the *de facto*

relations of these States with the British Government, from the course of action which has been followed by this Government towards them. Though we have to interpret this evidence ourselves, it is in itself perfectly legitimate." (Ibid page 425).

Applying the test laid down by Sir Henry Maine to the present case what is essential is to examine the terms of the treaty or sanad and other documents if any to ascertain whether the sovereign rights over the Tapti vested in the Peshwa were retained or transferred to the grantee of the Sachin State by the treaty 1791; for if the Peshwa retained such rights the British would, as successor to all the sovereign rights of the Peshwa, merely claim them and the Sachin State can have no valid claim to sand and gravel in half the bed of the river on the side of the Sachin State. The question whether or not the river is tidal and navigable does not appear to be material, since the general principle that the bed of a public navigable river is the property of Government has no application in the present case which is a dispute between two Governments.

3. It appears that prior to 1790-1791 the territory on both sides of the Tapti, together with the sovereignty over the Tapti, vested in the Peshwa. In 1790-1791 the Peshwa entered into an agreement with Seede Abdeol Kureem Khan, alias Balso Mesh. Article 1 of the agreement provides:

"That in consideration of your (i.e. Balso Mesh's) claims as heir, Jinjeera, Kansa, and the Mutghar Talooks in the Concan, resigned to Peshwa on the aforesaid forts with everything contained therein whatsoever, anam territory in Gujarat, situated on the seashore, is proposed to be given you, yielding a revenue equal to that of the territories dependent on Jinjeera, etc. The value of the territory to be ascertained by the average rate of collections for the last ten years. Of this at present territory, to the value of Rupees seventy five thousand has been given you, the remainder will be given on the aforesaid Talooks being delivered over to the Peshwa."

In the concluding part Balso Mesh engages faithfully to abide by the agreement entered into with the Peshwa through the mediation of Mr. Charles Warko Malet the Hon'ble Company's Resident at Poona. The territory granted to Balso under the agreement of 1790-91 forms the Sachin State. The agreement of 1790-91 defines neither the extent of the territory granted ~~thereunder~~

granted ¹⁵ Bales Meah not the boundaries thereof. What was granted thereunder was a territory yielding an annual income of Rs.75,000. That can furnish no proper basis for determining the boundaries of the territory. It is difficult to draw any inference from the agreement of 1790-91 that the Peshwa did not part with it.

4. The most important piece of evidence relied on by the Assistant Collector Salt Revenue is the recital in Article 8 of the Supplemental to the Treaty of Bassein 1803 that "inasmuch as the sovereignty of the River Taptee both belong to the British Government it is accordingly agreed and covenanted, that the Mahratta Authority in Oolpah shall have no right or concern whatever in the wreck of any vessel that may be cast upon any part of the Oolpah territory connecting with the said River Taptee etc." The ruler of the Sachin State was not a party to the treaty of Bassein and any admission made by the Peshwa with regard to the sovereignty over the River Tapti cannot be construed as an admission on the part of the ruler of the Sachin State and can have no probative value in determining the present dispute. It is not known why and to what extent the sovereignty of the British Government over the river was conceded by the Peshwa and whether it extended to half the bed of the river on the Sachin State side. Consequently Article 8 of the Supplemental to the Treaty of Bassein would not be conclusive evidence in support of the present claim of Government.

5. The next piece of evidence relied on by the Assistant Collector is the Advocate General's opinion No.88 of 1866. That relates to the question of the right of Gaikwar to open new ports. After examining the terms of the treaties and other papers the Advocate General opined: "Viewing the matter in the light of what has been the practice from the commencement of the present century as disclosed by the above extracts and the accompanying correspondence and bearing in mind the great

importance of preserving intact the rights of the British Government over the bays, rivers and creeks in the Gaikwar Gujarat territory I think it is most desirable that the ^{existing} British rights of supremacy over that territory should not be in the slightest degree disturbed by any narrow construction of Act VI of 1863, section XIII." What is true of the Gaikwar may not be true of Sachin, The Sachin State was established before the territory of Gujarat was ceded. Consequently the Advocate General's opinion which may be good with respect to the rights of the Gaikwar has little bearing on the rights of the Sachin State.

6. The last point urged by the Assistant Collector, Salt Revenue is the inclusion of the area in question within the limits of Surat port. Section 2(ii) of the Indian Ports Act, 1908 expressly saves all rights of property or other private rights. Consequently the extension of the Indian Ports Act to the area does not deprive the Sachin State of its right if any and no adverse inference can be drawn against the State.

7. It follows therefore that the evidence adduced on behalf of Government and the arguments advanced in support of its claim do not materially bear out the case of Government. On the contrary the fact that the State has in its possession documentary evidence to prove that it has been in enjoyment of the right of taking sand and gravel to the knowledge of the British Government since a very long time would it seems ^{mitigate} ~~mitigate~~ against the claim of Government. From the available material on record it would appear that the Government case is hardly strong enough to justify a representation to the Crown Representative. The view taken by A(R) is correct.

Sd/- P.N.MOOS.

25/8/44.

Remembrancer of Legal Affairs.

U.R. to R.D., No. 6005, dated the 28th August 1944.